NO. 57156-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RHETT GREENFIELD,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Rhett Greenfield volunteered for the ACLU of Washington in hopes he would eventually secure a paid position. When his hopes did not pan out, he demanded the Department of Labor and Industries make the ACLU-WA pay him for his volunteered time. But a volunteer's subjective desire for permanent employment does not create a retroactive obligation for a nonprofit to pay the volunteer. Allowing volunteers to unilaterally create "employment" relationships is not only contrary to the express language of the Minimum Wage Act, but also would discourage organizations with public-service missions from making use of volunteers whose support is crucial to those missions.

Washington's Minimum Wage Act expressly excludes from its coverage persons who volunteer for nonprofits. As the statute is directly on point, the Court need not reach Greenfield's requested analyses about employment or trainees, much less import inapplicable federal law and analysis. The

Director of Labor and Industries correctly applied the MWA exemption.

Substantial evidence supports the Director's determination that Greenfield was not an employee of the ACLU-WA and was exempt from MWA. This court should affirm the Director's decision.

II. STATEMENT OF THE ISSUES

RCW 49.46.010(3)(d) exempts from the Minimum Wage Act "[a]ny individual engaged in the activities of [a] . . . nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously." Greenfield volunteered at the nonprofit ACLU-WA for ten months without pressure or coercion. Does substantial evidence support the Director's determination that Greenfield was exempted from the MWA?

III. STATEMENT OF THE CASE

A. Overview of Applicable Law

The Minimum Wage Act establishes minimum employment standards for certain workers in Washington. RCW 49.46. Among other provisions, the MWA describes employers and employees subject to the Act, establishes minimum wages due to employees, and accords employees other rights and benefits. *See, e.g.*, RCW 49.46.010, RCW 49.46.020, RCW 49.46.130.

Washington's Wage Payment Act allows workers to file wage payment complaints with the Department of Labor and Industries, including complaints for violations of certain provisions of the MWA. RCW 49.48.083. "Wage Payment Requirements" subject to the WPA are limited: minimum wages and paid sick leave (RCW 49.46.020), overtime (RCW 49.46.130), agreed or obligated wages (RCW 49.52.050), unlawful deductions (RCW 49.52.060), and final pay and nonsufficient funds paychecks (RCW 49.48.010). RCW

49.48.082. The WPA requires L&I to investigate the worker's complaint and determine whether the alleged employer owes wages to the worker. RCW 49.48.083.

B. Greenfield Volunteered with the ACLU-WA to Support Its Mission and in Hopes that Volunteering Would Lead to Employment

The ACLU-WA is a nonprofit that defends civil rights and civil liberties. CP 1148-49. It engages volunteers as summer interns, in law student programs, on intake lines, as volunteer attorneys, and on special projects. CP 1149-50. Volunteers may decide to work with the ACLU-WA for a variety of reasons, including as a resume builder, to get references for law school or graduate school, to give back and support the ACLU's mission, and because they "are passionate about the things [the ACLU does] and they want to be involved and make a difference." CP 1153.

Rhett Greenfield wanted to be part of that mission—he "wanted to contribute to an organization that has historically upheld important principles and achieved meaningful gains

within the court system." CP 502. When he moved back to Washington and was determining whether to attend law school, he applied to an intake counselor intern position at the ACLU-WA. CP 502, 1379-80, 1408-09. Greenfield hoped that the internship would help him obtain full-time, gainful employment with the ACLU-WA. CP 1308, 1388.

The advertisement for the intake counselor opening stated that it was an internship, and did not indicate it was a paid position. CP 501-02, 730, 1042, 1179. Greenfield had previously held other unpaid internships, as well as internships that only offered a stipend. CP 1307, 1371-72. Once Greenfield began the internship, he received an orientation packet that explained it was a volunteer position. CP 1182.

During his internship, Greenfield worked as an intake counselor, answering a phone line where members of the public could find out about community resources for various legal and non-legal issues. CP 1175. None of the ACLU-WA's volunteer interns were paid. CP 1150-51, 1153, 1172, 1273-74. Some

may have received academic credit or a token stipend, but these were not wage-earning positions. CP 1150-51, 1172-74. Greenfield acknowledged that that the ACLU-WA never promised (or even suggested) that he would be paid for his internship. CP 1307-09, 1371-74. No one coerced or pressured Greenfield into volunteering; rather, he choose to volunteer to determine if he wanted to go to law school and because believed in the ACLU's mission. CP 502, 1379-80, 1387-88, 1408-09.

In his ten months as an intake counselor intern with the ACLU-WA, Greenfield was never paid, never sought payment, and never filled out any employment paperwork or tracked his hours. CP 1172-74, 1177, 1275, 1303, 1371-74, 1385-86. Nor did anyone at the ACLU-WA ever tell him he would be paid or that he was guaranteed a job. CP 499-505, 1173-74, 1274, 1303, 1372-74, 1379, 1381.

Nonetheless, Greenfield hoped the position would lead him to a paid position with the ACLU-WA in the future: "I

expected the position to translate into full-time, paid employment ('payment,' 'remuneration')." CP 584; *see also* 1388. He communicated this desire to the ACLU-WA repeatedly. CP 584, 1307-08, 1316-17.

Before his internship, Greenfield had applied for a paid position with the ACLU-WA. CP 1158-1160. He was not selected for that position. *Id*. During his internship, he also applied for a paid position with the ACLU-WA as a legal assistant. CP 1162-63. He was not a successful candidate for that position either. CP 375. After his internship ended, he continued to apply for open, paid positions with the ACLU-WA but was not hired for any of those jobs. CP 375, 1164-66, 1313.

C. L&I Issued a Determination of Compliance Because Greenfield Was a Volunteer for a Nonprofit and There Were No Violations of Wage Payment Requirements

A few months after his internship ended, Greenfield filed a worker's rights complaint with L&I. CP 373-74. When Greenfield filled out his complaint, he did not list a pay rate or how much he believed he was owed, and he did not indicate

whether he was fired or quit his job. CP 373-74, 1197-98. Rather, Greenfield contended that he was guaranteed employment at the conclusion of his internship and suggested that, in his view, he was entitled to pay for the internship as well. CP 373-76. Greenfield explained: "I worked at the ACLU-WA as an 'Intake Counselor,' an unpaid internship that I believed would lead to a full-time position at this specific employer. I was never paid, nor was I hired. None of this was consensual." CP 373.

L&I investigated his wage complaint, obtaining information from both Greenfield and the ACLU-WA. CP 314-606, 1194-1210, 1212-21. The L&I investigator found no evidence that anyone at the ACLU-WA indicated that Greenfield would be paid for intake counselor volunteer work or that he would receive a paid position. CP 1203-04. After completing the investigation, L&I issued a Determination of Compliance. CP 289-91.

D. The Director Affirmed the Determination of Compliance, Finding that Greenfield Was Not an Employee of the ACLU-WA and the ACLU-WA Did Not Violate Wage Payment Requirements

Greenfield appealed the Determination of Compliance. CP 292-313. After a hearing on the merits, an administrative law judge issued an initial order affirming L&I's decision. CP 172-82. The ALJ concluded that:

> [Greenfield] choose to work gratuitously for ACLU-WA as an intake counselor for several months, during which time no formal employer-employee relationship was established. Under RCW 49.46.010(3)(d), [Greenfield] was not an employee and ACLU-WA did not violate any wage payment laws by not paying him for his volunteer services.

CP at 180.

Greenfield petitioned for the Director's review of the initial order. CP 45-77. The Director performed a de novo review and then adopted the findings and conclusions of the initial order. CP 41-44. Greenfield petitioned the superior court for judicial review. CP 17-26. The superior court affirmed the Director's order. CP 1505-07.

Greenfield now appeals to this Court.

IV. STANDARD OF REVIEW

The Washington Administrative Procedures Act, RCW 34.05, governs review of the Director's final order. RCW 49.48.084(4). The appellate court sits in the same position as the superior court and reviews the agency record directly. *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 47, 308 P.3d 745 (2013) (citing *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998); RCW 34.05.526. The court generally may not consider additional evidence not contained in the agency record. RCW 34.05.558, RCW 34.05.562.

Under the APA, "[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a). Pertinent here, a court will reverse an agency decision when it is based on an error of law or is not supported by substantial evidence. RCW 34.05.570(3).

The court reviews issues of law de novo. *City of Redmond*, 136 Wn.2d at 46. While the court is not bound by an agency's interpretation of the law, it accords deference to interpretations within the agency's area of specialized expertise. *Id.*

Where factual issues are on appeal, the substantial evidence standard is highly deferential to the fact finder. *Motley–Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the order. *Id.* at 77 (quoting *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995)). The court views the evidence and all reasonable inferences from the evidence "in the light most favorable to the party who prevailed." *Brown v. Dep't of Social & Health Services*, 190 Wn. App. 572, 593-94, 360 P.3d 875 (2015). Where there is conflicting evidence, the court does not reweigh the evidence. *See In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

V. ARGUMENT

The MWA contains an exemption for nonprofit volunteers like Greenfield. RCW 49.46.010(3)(d). The statutory exemption is unambiguous, and its plain language excludes nonprofit volunteers from the MWA's coverage. *Id.* Greenfield's brief largely ignores this exemption, and when he finally addresses it, he misreads the provision and misrepresents L&I's interpretation. AB 28-37. The Director properly analyzed and applied the exemption to Greenfield's volunteer work at the ACLU. The Director also correctly interpreted the statute, and substantial evidence supports his factual determinations under the applicable legal standard.

A. The Director Properly Determined that Greenfield Was a Nonprofit Volunteer Exempt from the Minimum Wage Act

The MWA applies only to employees. RCW 49.46. "Employee" is defined in the MWA to exclude "any individual engaged in the activities of a[] . . . nonprofit organization" either when the individual's services "are rendered to such

organizations gratuitously" or "where the employer-employee relationship does not in fact exist." RCW 49.46.010(3)(d).[1] The statute recognizes there is a difference between a nonprofit's employees—who are subject to the MWA—and two other classes of nonemployees: its volunteers who offer their services gratuitously, and any other persons who perform services for the nonprofit without establishing an employer–employee relationship. When such individuals provide their services without expectation of wages, or otherwise engage in the

[1] RCW 49.46.010(3)(d) provides in full:

> Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW.

nonprofit's activities without an employment relationship, the MWA does not apply. As discussed in Part V.D below, Greenfield was a volunteer subject to the gratuitous services exception and the MWA did not apply to his volunteer services for the ACLU-WA.

The fundamental objective in interpreting a statute is to give effect to the Legislature's intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). The plain language of the statute is "[t]he surest indication of [that] legislative intent." *Id.* (first alteration in original) (quoting *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Here, the plain language exempts from the MWA persons who perform services for a nonprofit "gratuitously." RCW 49.46.010(3)(d). Services are rendered "gratuitously" where they are "given freely," cost nothing, or do not involve "a return benefit, compensation, or consideration." Gratuitous, *Merriam-Webster's Unabridged*

Dictionary, 1961.[2] The statute's language shows that the Legislature unambiguously understood there was a class of persons performing services for nonprofits without earning compensation and that it intended to specifically exclude those persons from coverage under the MWA.[3]

Greenfield argues the Director erred in interpreting the exemption, based in part on the fallacious claim that L&I seeks a "blanket" exemption for all nonprofit workers. *See* AB 28-33. But L&I has never argued that nonprofits are exempt from the

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[2] https://unabridged.merriam-webster.com/unabridged/gratuitous (last visited Feb. 8, 2023).

[3] If the statute were ambiguous, L&I administrative policy ES.A.1 explains that the statute excludes "[a]ny volunteer engaged in the public service activities of" a nonprofit. Wash. Dep't of Lab. & Indus., Emp. Standards, Admin. Pol'y ES.A.1, Minimum Wage Act Applicability 3 (2020), https://lni.wa.gov/workers-rights/_docs/esa1.pdf. It notes that "[i]ndividuals who volunteer or donate their services, usually on a part-time or irregular basis, for public service or for humanitarian objectives, and are not acting as employees or expecting pay, are not generally considered employees of the entities for whom they perform their services." *Id.* at 3-4; *see also* CP 507 (excerpt). Under L&I's policy, a volunteer must freely offer their services "without pressure or coercion, direct or implied, from an employer." Admin. Pol'y ES.A.1 at 3.

MWA. Their actual employees are entitled to the same MWA protections as for-profit company employees, and it is only individuals who volunteer or otherwise do not have an employer–employee relationship that are exempt under the unambiguous terms of RCW 49.46.010(3)(d).

The "disjunction" in the statute—the use of the word "or" when describing the two kinds of exempt individuals—means the opposite of what Greenfield argues. *See* AB 30. The "or" between the nonemployee and volunteer sections of the exemption shows that the two are separate exemption options, and should be examined and addressed separately. For example, jurors are exempt under the nonemployee portion of RCW 49.46.010(3)(d). *Rocha v. King County*, 195 Wn.2d 412, 423, 460 P.3d 624 (2020). They are neither employees nor gratuitous volunteers. *Id.* at 423-24. Greenfield, on the other hand, is a volunteer and exempt on that basis. Eliminating the plain language analysis of the separate volunteer portion of the exemption and replacing it with an employer–employee

analysis, as Greenfield urges, would render gratuitous the phrase "*or* where the services are rendered to such organizations gratuitously." RCW 49.46.010(3)(d) (emphasis added). The plain language of the statute shows that volunteers like Greenfield are exempt based solely on their gratuitous rendering of services to the nonprofit, with no other qualification.

Finally, Greenfield's suggestion that the statute could be worded differently does not render it ambiguous, nor the volunteer exemption superfluous.[4] AB 29-30. Courts may not ignore unambiguous language because a preferable version can be imagined. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 460-61, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (*quoting Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000)).

[4] Greenfield's suggested rewording is a straw man—neither the statute nor L&I seek to exclude all nonprofits from the MWA. Nor is there any basis for the suggested "contractual agreement" requirement. *Contra* AB 30.

Here, the statute is unambiguous and has been consistently interpreted to exempt nonprofit volunteers from the MWA's coverage. The Director correctly applied the plain language of the exemption.

B. Greenfield's Misplaced Reliance on the Minimum Wage Act's "Employment" Definition Would Render the Nonprofit Volunteer Exemption Meaningless

Greenfield's request that the Court instead analyze whether he was "employed" by the ACLU-WA (either because he was "suffer[ed] or permit[ted] to work" or because he qualified as a "trainee") is improper. *See* AB 6, 18, 22, 31, 37.[5] Courts do not apply tests for determining employment relationships where there is already an exemption under the express language of the MWA. *Rocha*, 195 Wn.2d at 423. Here, RCW 49.46.010(3)(d)'s plain language applies to Greenfield

[5] Greenfield refers to "performance of labor," which is not an applicable standard or definition of employment. "Permit to work" or "suffer or permit to work" are common shorthand for the concepts he discusses. *See* AB 18, 22.

and exempts him from the MWA; thus, no test for employment applies.

Greenfield's arguments that this Court should consider other definitions of employment in order to determine his status are also improper. AB 18-28, 31, 37-41. For instance, Greenfield claims that he does not qualify as an intern/trainee and therefore must be an employee.[6] AB 40-41. But the intern test is designed for for-profit entities; unlike at a nonprofit, a person cannot legally volunteer at a for-profit company. Admin. Pol'y ES.A.1 at 4; CP 1210. The L&I policy applicable to volunteers at nonprofit organizations is ES.A.1. CP 1210, 1213.

Likewise, the Court should not look to other statutory schemes when analyzing the MWA. Greenfield cites to definitions of employment under the Industrial Welfare statute (RCW 49.12), the Washington Industrial Health and Safety Act

[6] Greenfield only tangentially references the Washington test for interns or trainees, instead primarily relying on an outdated federal test. AB 37-41. Both are inapplicable.

(RCW 49.17), and the Worker and Community Right to Know Act (RCW 49.70). AB 18-20. These definitions are not applicable when there is already a definition in the MWA. The same term used in different statutory schemes may carry a different meaning, depending upon the context in which it was used. *Graham v. State Bar Ass'n*, 86 Wn.2d 624, 626, 548 P.2d 310 (1976). There is no basis for inferring a legislative intent to import the definition of employment from these statutes to the MWA. *See Auto Value Lease Plan, Inc., v. Am. Auto Lease Brokerage, Ltd.*, 57 Wn. App. 420, 423, 788 P.2d 601 (1990).

Finally, Greenfield's assertion that any person who is "suffer[ed] or permit[ted] to work" is an employee covered by the MWA regardless of whether they fall under one of the specific exemptions in RCW 49.46.010(3) would render those exemptions meaningless. AB 18-28, 37-41. Courts may "not interpret a statute in any way that renders any portion meaningless or superfluous." *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (quoting *Jongeward v. BNSF Ry. Co.*,

174 Wn.2d 586, 601, 278 P.3d 157 (2012)). Greenfield essentially requests this outcome: that another test be used to trump the exemption. AB 37-41. Such a result would directly conflict with the express, plain language of the statute and the clear intent of the Legislature to exempt nonprofit volunteers, and must be rejected.

C. Greenfield's Reliance on Federal Law is Misplaced Because It Differs Substantially from Applicable State Law

The federal Fair Labor Standards Act provides no helpful guidance here because the FLSA does not contain the exemption for nonprofit volunteers found in the MWA. *See* 29 U.S.C. § 203. Washington courts only consider interpretations of FLSA provisions when there are comparable provisions in the MWA; when state law is different from federal law, they do not. *See Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 619-20, 416 P.3d 1205 (2018). Here, there is no comparable federal provision. *Compare* RCW 49.46.010(3) *with* 29 U.S.C.

§ 203(e).[7] The FLSA cannot create an employee under the MWA where the specific language of an exemption excludes the individual.

Further, Greenfield's proposed federal tests are both outdated and factually inapposite. *See* AB 33-34, 37, 39. More recent federal decisions have focused on "captur[ing] the true nature" of the relationship between the putative employee and employer, rather than a rigid set of isolated "primary beneficiary" factors. *See, e.g.*, *Dawson v. National Collegiate Athletic Assoc.*, 932 F.3d 905, 909, 911 (9th Cir. 2019). And in the cases he cites, the issues related to employees at for-profit businesses or engaged in commercial activities rather than

[7] The FLSA further differs from the MWA because it excludes most nonprofit and charitable organizations like the ACLU-WA. *See, e.g.*, 29 U.S.C. § 203(s)(1)(A), 206(a), 207(a); U.S. Dep't of Lab., Wage & Hour Div., Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA) (2015), https://www.dol.gov/agencies/whd/fact-sheets/14a-flsa-non-profits; *see* CP 1148-49. The FLSA also "recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes." Fact Sheet #14A.

volunteers at nonprofits performing public interest work. *See, e.g.*, *Benjamin v. B & H Education, Inc.*, 877 F.3d 1139 (9th Cir. 2017) (addressing *for-profit* employment of trainees); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) (vulnerable workers coerced to support *commercial business activities*). Because Greenfield's reliance on such decisions is misplaced, the Court should disregard his arguments.

D. Substantial Evidence Supports the Director's Determination that Greenfield Was a Volunteer Exempt from the Minimum Wage Act

After correctly determining the applicable exemption to analyze, the Director determined that Greenfield met its requirements. Substantial evidence supports this determination when the record demonstrates that Greenfield offered his services gratuitously.

Indeed, the critical issues are nearly undisputed. Greenfield himself admitted at hearing that he was never told, much less promised, that he would be paid for his time as an

intake counselor. *See, e.g.*, CP 1371-73.The internship listing did not suggest pay, and the ACLU-WA materials that Greenfield received referred to the position as a "volunteer" position. CP 1179, 1182. The ACLU-WA never requested, and Greenfield never filled out, any employment paperwork for a paid position. CP 1172-74, 1303. Nor did the ACLU-WA track or ask Greenfield to submit his hours as would be needed to pay for hours worked, if any pay was expected. CP 1173, 1177, 1385-86.

Greenfield never sought, nor apparently expected, pay during his time as an intake counselor. CP 1174, 1371-73. Greenfield was not coerced or pressured into volunteering. CP 502, 1379-80, 1387-88, 1408-09. Rather, he hoped that the intake counselor position would eventually open the door to permanent, paid employment. CP 1308, 1388. It did not; nor did anyone at the ACLU-WA ever tell Greenfield it would. CP 1274, 1379, 1381. The record shows that Greenfield rendered

his services gratuitously—without pay or the expectation of wages—and substantial evidence supports the Director's order.

Greenfield suggests that his service was not gratuitous because he expected that the ACLU-WA would eventually offer him a full-time, paid job. AB 42. But neither Greenfield's subjective desire for a permanent job nor his retroactive request for compensation can convert a volunteer opportunity into employment. *See, e.g.*, *Brown v. N.Y.C. Dep't of Education*, 755 F.3d 154, 166 (2d Cir. 2014) (To accept a claimant's subjective expectation of compensation "would allow individuals to wish themselves (however unreasonably) into being owed . . . wages."). And in any case, this Court does not reweigh the evidence on appeal. *See In re Est. of Lint*, 135 Wn.2d at 532. Greenfield admitted that the ACLU-WA never promised him a job. CP 1379, 1381. The ACLU-WA confirmed that intake counselors, including Greenfield, were not promised a job at the end of their volunteer stint—in fact, no one even

had the authority to suggest Greenfield would receive a job. CP 502, 1174-75, 1274.

Greenfield cannot meet his burden of showing the Director's decision was invalid.

VI. CONCLUSION

For the foregoing reasons, L&I asks this Court to affirm.

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RESPECTFULLY SUBMITTED this 13th day of February, 2023.

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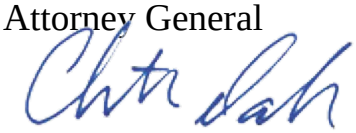

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NO. 57156-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RHETT GREENFIELD, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service in the below described manner:

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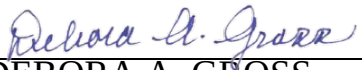

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